

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, <i>et al.</i>,)	
)	
Plaintiffs)	
)	
vs.)	Case No. 4:05-cv-00329-GKF-PJC
)	
)	
TYSON FOODS, INC., <i>et al.</i>)	
)	
Defendants)	

SIMMONS FOODS, INC. TRIAL BRIEF

Simmons Foods, Inc. (“Simmons”) submits this Trial Brief to the Court, and in compliance with the Court’s request, will keep it as brief and concise as possible. Simmons has joined with other Defendants in certain other trial briefs which contain additional legal arguments and authorities.¹ In consideration of the Court’s time and resources, Simmons will not repeat those arguments here but instead wishes to draw the Court’s attention to certain Simmons’ specific facts and issues.

1. Background

Simmons is a family-owned Arkansas-based company with its headquarters located in Siloam Springs, Arkansas. The company was founded by Bill Simmons in 1949 (along with a partner that Bill bought out a few years later). Mark Simmons, the current CEO took the reins in 1974 at the age of 27 after the untimely death of his father Bill Simmons. At present, Mark’s son Todd is preparing to take over the family business.

¹ Simmons is a party to a certain Trial Brief to be filed subsequently by the Tyson Defendants and Simmons joined in and adopted Defendants Cargill, Inc. and Cargill Turkey Corporation, LLC’s Joint Trial Brief [Dkt. #2628].

Throughout the years, Simmons has attempted to be a responsible steward of the environment. In fact, Simmons has spent millions of dollars upgrading its process water treatment facilities and received an award from the state of Missouri in 2007 for its process water treatment plant at its Southwest City, Missouri facility.

In the 1990's when the issues surrounding the possibility of excess phosphorus and nitrogen were being discussed by the academicians, Simmons was one of the first companies to take an active role in attempting to understand the issues. Simmons dedicated a full-time employee, Claud Rutherford, to Governor Bill Clinton's Animal Waste Task Force. In other words, Simmons paid Rutherford his full salary to attend meetings, gather needed information, and such other activities as needed by the task force.

As information concerning best management practices regarding the use of litter as fertilizer became known, Simmons helped facilitate meetings with the regulatory agencies and growers so that this information could be shared with the growers. Simmons modified its contracts to require its growers to implement best management practices. Later, when the regulatory agencies began writing nutrient management plans, Simmons changed its contracts to require all its growers to obtain and follow a nutrient management plan. When laws were passed in Arkansas and Oklahoma regulating the use of poultry litter as fertilizer, Simmons required its growers to follow those laws and regulations. Simmons is not aware of, and the State has not come forward with evidence of, any of its growers ever being cited or fined due to the improper handling of poultry litter.²

² One of the farmers who raises chickens under contract with Simmons was fined for improper disposal of dead birds. However, the State has not raised any claims in this case regarding improper disposal of birds.

Litter has always belonged to the grower; this is not a new phenomenon. Plaintiff would have the Court believe that Simmons and other poultry companies foist the litter onto the growers against their will. However, that is just not an accurate depiction of reality. The grower purchases the bedding material and it has always remained his property. The grower has always been the party that had control over the litter and how it is used. The legislatures of both Arkansas and Oklahoma recognize that the litter belongs to the growers – the laws and regulations concerning litter and its management are all directed at the growers, not at the companies. Litter is considered a valuable resource. In fact, testimony at trial will show that some people began grower poultry primarily because they wanted the litter so they could grow grass for their cattle operations. (*See e.g.*, Ex. 1, excerpt of deposition of W.A. Saunders). Litter is not a “waste” product but instead is a valuable organic fertilizer.

2. Plaintiff is unable to prove its claims against Simmons

As Plaintiff’s counsel admitted in open court, Plaintiff has the burden of proving its case against each Defendant. Plaintiff is unable to do so. From the beginning, Plaintiff has prosecuted its case as a claim against an “industry” and a “product.” Plaintiff’s case is essentially this: a lot of litter is produced in the watershed; litter contains phosphorus and bacteria; there is phosphorus and bacteria in the waters of the IRW; therefore, Defendants are liable. That simply is insufficient under the law to meet Plaintiff’s burden of proof.

A. Plaintiff lacks sufficient evidence to prove that Simmons caused any injury in the IRW.

Plaintiff does not have legally sufficient evidence to prove that Simmons is the cause of injury in the IRW. *Cf. Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 777 (10th Cir. 2009). The Tenth Circuit affirmed this Court’s decision to deny Plaintiff’s motion for preliminary injunction

because Plaintiff failed to establish a link between land application of poultry litter in the IRW and bacteria. *Id.* Based on deposition testimony and reports of Plaintiff's experts, the evidence Plaintiff intends to put on at trial is much the same as it put on during the hearing on the preliminary injunction. Accordingly, Plaintiff will be unable to establish a link between phosphorus and bacteria in the watershed and the use of poultry litter as fertilizer.

Moreover, as stated previously, Plaintiff must prove its claim against each of the Defendants. Thus, even if Plaintiff could establish a link between the land application of poultry litter and phosphorus or bacteria in the watershed, such is not sufficient to hold Simmons legally responsible for any alleged injury. Instead, Plaintiff must establish a link between the land application of poultry litter by Simmons (or someone for whom Simmons is legally liable) and the existence of sufficient quantities of phosphorus or bacteria from that poultry litter in the water to constitute pollution to the waters of the State in the IRW.³ Plaintiff simply lacks the necessary proof.

As previously briefed in Defendants' motions for summary judgment⁴ causation is a necessary element of Plaintiff's remaining claims. *Twyman v. GHK Corp.*, 93 P.3d 51, 54 n. 4 (Okla. Civ. App. 2004); *Angell v. Polaris Prod. Corp.*, 280 Fed. App. 748, 2008 U.S. App. LEXIS 12007 (10th Cir. June 4, 2008); (tort law causation); *Angell v. Polaris Prod. Corp.*, 280 Fed. App. 748, 2008 U.S. App. LEXIS 12007 (10th Cir. June 4, 2008) (same); *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 114 (Mo. 2007) (same); 42 U.S.C. § 6972(a)(1)(B) (RCRA causation); *Oklahoma v. Tyson Foods*, 565 F.3d 769, 776-79 (10th Cir. 2009) (same);

³ See 27A Okla. Stat. § 1-1-201 (10).

⁴ *Defendants' Motion for Partial Summary Judgment Dismissing Counts 1, 2, 3, 5, 6, and 10 Due to Lack of Defendant-Specific Causation and Dismissing Claims of Joint and Several Liability under Counts 4, 6, and 10* [Dkt. #2069, at 16-21], the arguments and authorities of which are incorporated herein.

Opinion and Order, Dkt. No. 1765 at 7 (Sept. 29, 2008) (Frizzel, J.) (same).⁵ Plaintiff must prove that Simmons was both a cause-in-fact and a proximate cause of its alleged injuries.

As this Court and the Tenth Circuit Court of Appeals previously pointed out, Plaintiff did not attempt to conduct a traditional fate and transport analysis. *Okla. v. Tyson Foods, Inc.*, 565 F.3d 769 (10th Cir. 2009). Instead, Plaintiff simply asserts “there is all this litter produced in the IRW and therefore it must be the cause of the [alleged] injury to the IRW.”⁶ Plaintiff’s theory is not sufficient because Oklahoma does not recognize market-share or other collective liability theories. *See Wood v. Eli Lilly & Co.*, 38 F.3d 510, 512-513 (10th Cir. 1994); *Case v. Fibreboard Corp.*, 743 P.2d 1062, 1067 (Okla. 1987). Accordingly, Plaintiff must prove causation specifically against Simmons. Plaintiff cannot meet that burden; Plaintiff’s experts confirm the lack of any attempt to prove causation against Simmons or any other specific Defendant.⁷

B. Plaintiff cannot recover on its statutory claim against Simmons.

Under Plaintiff’s statutory claim, it must show that Simmons “caused” pollution to the waters of Oklahoma or “place[d] or cause[d] to be placed” wastes⁸ in a location where they are likely to cause pollution” of the waters of Oklahoma. 27A Okla. Stat. § 2-6-105(a). Simmons does not own or operate any poultry farms in the IRW. Simmons has never generated any poultry litter in the IRW, nor has it land-applied any litter in the IRW. Thus, Simmons has not placed or caused to be placed any litter in the IRW that could cause pollution.

⁵ *See also* Dkt. No. 2069 at 16-21; Dkt. No. 2259 at 1-8.

⁶ Lest there be any allegations that this is intended to be a direct quote of the State, it is not. It is a paraphrase of the State’s claims.

⁷ *See* Defendant Peterson Farms, Inc.’s Trial Brief, at pp. 11-12 [Dkt. #2625], the arguments and authorities of which are incorporated herein.

⁸ Simmons disputes that poultry litter is “waste.” To the contrary, poultry litter is a valuable resource for which people provide valuable consideration. Animal manures that are bought, sold and beneficially applied as fertilizer or soil conditioner are not “discarded.” *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1045 (9th Cir. 2004); *Safe Food & Fertilizer v. EPA*, 350 F.3d 1263, 1268 (D.C. Cir. 2003).

Plaintiff is attempting to hold Simmons liable for the actions of its growers and other third parties. The Court has now ruled that the Defendants cannot be held liable for the actions of third parties that are not contract growers. Plaintiff claims, without legal support, that Simmons is liable under the statute for the actions of its contract growers. Plaintiff has been unable to cite any cases that hold that one can be held liable for a *state statutory violation* based on vicarious liability. To the contrary, “[f]undamental fairness would require that one charged with and penalized for violation be shown to have caused, or at least to have knowingly acquiesced in, that violation.” *Brennan v. OSHRC*, 511 F.2d 1139, 1145 (9th Cir. 1975).

Even assuming *arguendo* that Simmons could be found in violation of the statute based on the actions of its third-party contract growers, the State still has to prove a specific violation. That is, the State must prove a specific action on a specific day on which the violation occurred. The statute provides that penalties can be assessed for “each day or part of a day upon which it [the violation] occurred.” 27A Okla. Stat. § 2-3-504(A)(2) & (D). Thus, proof of specific violations on a specific day or part of a specific day is necessary. The State simply does not have such proof. In fact, the State has not come forward with proof of any specific instances in which the statute has been violated by Simmons or any of the other Defendants.

The State cannot meet its burden of proof by simply alleging that poultry litter (or some constituents of poultry litter) ran off of a field. Instead, the term “pollution” is defined by statute and requires proof that a *sufficient quantity* of the alleged waste ran off a field on a particular day and made its way to the waters of the State to create a nuisance. 27A Okla. Stat. 2-1-102(12).

In addition, the statute only applies to “wastes” and as discussed previously, poultry litter is not “waste” but in contrast is a valuable resource utilized by many as a beneficial fertilizer and soil conditioner.⁹ Thus, the statute does not apply to the facts of this case.

CONCLUSION

At the close of Plaintiff’s case, the evidence will show that the State will have failed to meet its burden of proof establishing specific causation against Simmons. Consequently, Simmons will be moving for a directed verdict in its favor pursuant to Fed. R. Civ. Proc. 50(a)(1).

SIMMONS FOODS, INC.

By:/s/Vicki Bronson _____
John R. Elrod
Vicki Bronson, OK Bar Number 20574
CONNER & WINTERS, LLP
211 East Dickson Street
Fayetteville, AR 72701
(479) 582-5711
(479) 587-1426 (facsimile)

CERTIFICATE OF SERVICE

I hereby certify that on 21st day of September, 2009, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants

Melvin David Riggs
Richard T. Garren
Sharon K. Weaver
David P. Page
Riggs Abney Neal Turpen Orbison

Robert M. Blakemore
Louis W. Bullock
Bullock Bullock & Blakemore
110 West 7th Street, Suite 707
Tulsa, OK 74119-1031

⁹ See Defendants’ previous briefs on RCRA issues at Dkts. 64, 145, 1531, 2050, and 2237, the arguments and authorities of which are incorporated herein.

& Lewis
502 W. 6th St.
Tulsa, OK 74119-1010
Counsel for Plaintiffs

Robert Allen Nance
Dorothy Sharon Gentry
Riggs Abney
5801 N. Broadway
Suite 101
Oklahoma City, OK 73118
Counsel for Plaintiffs

William H. Narwold
Ingrd L. Moll
Motley Rice LLC
20 Church St., 17th Floor
Hartford, CT 06103
Counsel for Plaintiffs

Fidelma L. Fitzpatrick
Jonathan D. Orent
Michael L. Rousseau
Motley Rice LLC
321 S. Main St.
P.O. Box 6067
Providence, RI 02940
Counsel for Plaintiffs

Michael R. Bond
Erin W. Thompson
Kutak Rock, LLP
234 E. Millsap Rd, Suite 400
Fayetteville, AR 72701

Robert W. George
L. Bryan Burns
Tyson Foods, Inc.
2210 West Oaklawn Dr.
Springdale, AR 72764
Counsel for Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., and Cobb-Vantress, Inc.

Mark D. Hopson
Timothy K. Webster

Counsel for Plaintiffs

W.A. Drew Edmondson
Attorney General
Kelly Hunter Burch
J. Trevor Hammons
Daniel P. Lennington
Assistant Attorneys General
State of Oklahoma
313 N.E. 21st St.
Oklahoma City, OK 73105
Counsel for Plaintiffs

Elizabeth C. Ward
Frederick C. Baker
Lee M. Heath
Elizabeth Claire Xidis
Motley Rice LLC
28 Bridgeside Blvd.
P.O. Box 1792
Mount Pleasant, SC 29465
Counsel for Plaintiffs

Patrick M. Ryan
Stephen L. Jantzen
Paula M. Buchwald
Ryan, Whaley & Coldiron
900 Robinson Renaissance
119 North Robinson, Suite 900
Oklahoma City, OK 73102
Counsel for Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., and Cobb-Vantress, Inc.

John H. Tucker
Colin H. Tucker
Theresa Noble Hill
Rhodes, Hieronymus, Jones, Tucker & Gable, P.L.L.C.
100 West Fifth St., Suite 400
Tulsa, OK 74121-1100
Counsel for Cargill, Inc. and Cargill Turkey Production, LLC.

Jay T. Jorgensen
Sidley, Austin Brown & Wood, LLP
1501 K. Street, N.W.
Washington, D.C. 20005-1401
Counsel for Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., and Cobb-Vantress, Inc.

Woody Bassett
Gary Weeks
James W. Graves
KC Tucker
Bassett Law Firm
P.O. Box 3618
Fayetteville, AR 72702-3618
Counsel for George's, Inc. and George's Farms, Inc.

Randall Eugene Rose
George W. Owens
Owens Law Firm PC
234 W. 13th St.
Tulsa, OK 74119-5038
Counsel for George's, Inc. and George's Farms, Inc.

Delmar R. Ehrich
Bruce Jones
Krisann Kleibacker Lee
Christopher H. Dolan
Faegre & Benson
90 S. 7th St., Suite 2200
Minneapolis, MN 55402-3901
Counsel for Cargill, Inc. and Cargill Turkey Production, LLC

Robert P. Redeman
Lawrence W. Zeringue
David C. Senger
Perrine, McGivern, Redemann, Reid, Berry & Taylor, PLLC
P.O. Box 1710
Tulsa, OK 74101
Counsel for Cal-Maine Foods, Inc. and Cal-Maine Farms, Inc.

Todd P. Walker
Faegre & Benson LLP
3200 Wells Fargo Center
1700 Lincoln Street
Denver, CO 80203
303-607-3500
303-607-3600
Counsel for Cargill, Inc. and Cargill Turkey Production LLC

Scott McDaniel
Nicole M. Longwell
Craig A. Mirkes
McDaniel, Hixon, Longwell & Acord, PLLC
320 South Boston Ave., Suite 700
Tulsa, OK 74103
Counsel for Peterson Farms, Inc.

Sherry P. Bartley
Mitchell Williams Selig Gates & Woodyard PLLC
425 W. Capitol Ave., Suite 1800
Little Rock, AR 72201-3525
Counsel for Peterson Farms, Inc.

Jennifer Stockton Griffin
David G. Brown
Lathrop & Gage LC
314 E. High St.
Jefferson City, MO 65101
Counsel for Willow Brook Foods, Inc.

Raymond Thomas Lay
Kerr Irvine Rhodes & Ables
201 Robert S. Kerr Ave.
Suite 600
Oklahoma City, OK 73102
Counsel for Willow Brook Farms, Inc.

Robert E. Sanders
Stephen Williams
Young, Williams, Henderson & Fusilier
P.O. Box 23059
Jackson, MS 39225-3059
**Counsel for Cal-Maine Foods, Inc. and
Cal-Maine Farms, Inc.**

/s/ Vicki Bronson
Vicki Bronson